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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

NO. 71-6060

ANTHONY LOUIS TACON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

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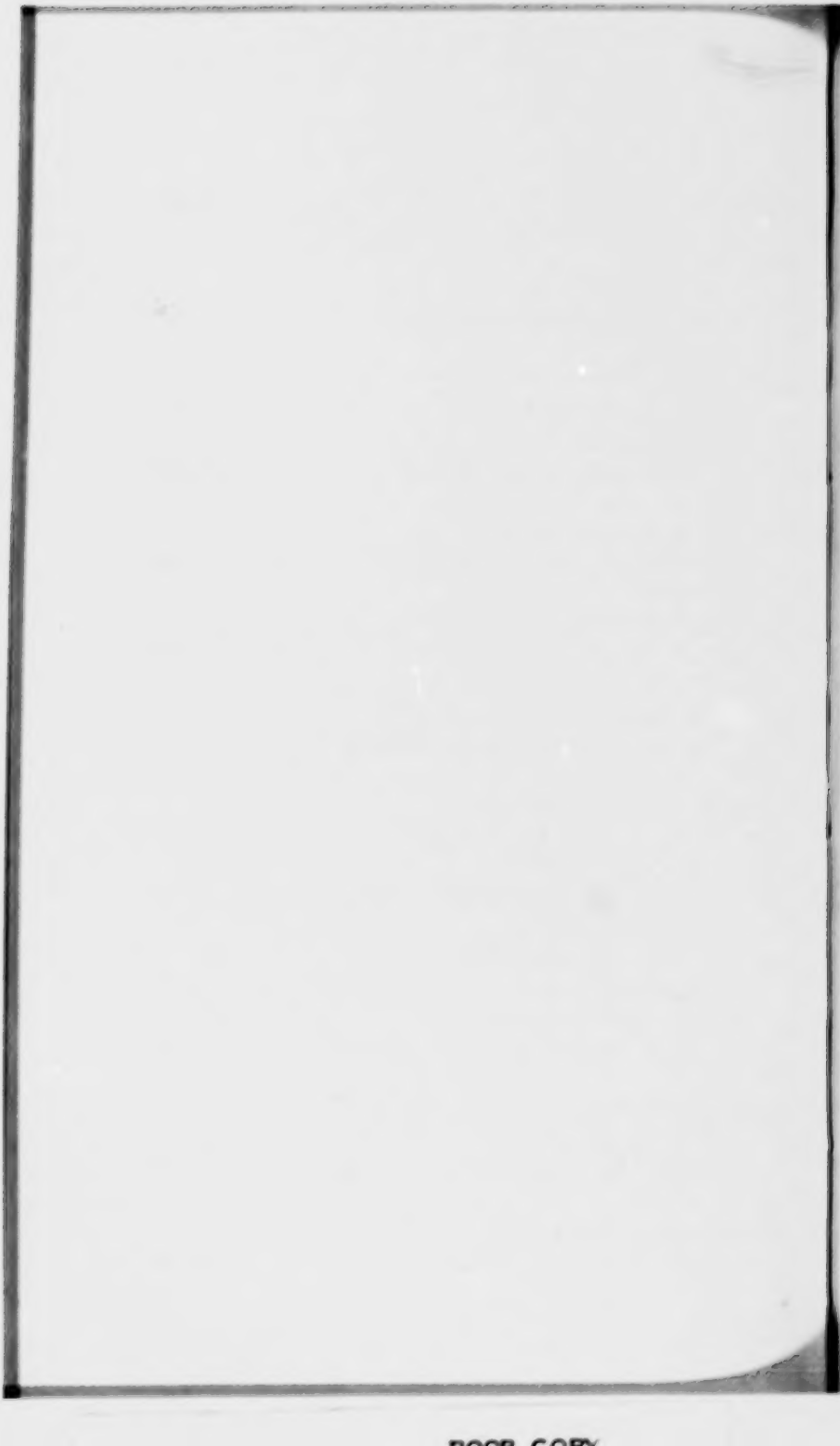

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BRIEF FOR THE RESPONDENT

GARY K. NELSON
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OPINION BELOW: JURISDICTION, CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The State of Arizona accepts Petitioner's presentation of these items.

QUESTIONS PRESENTED

Respondent presents its own questions to frame the issues more exactly:

1. Can a defendant who is charged with a non-capital felony and who has waived his right to be present at trial be tried in absentia constitutionally?

2. Did the State Court hold an adequate hearing and make a proper finding on the issue of the voluntariness of Petitioner's waiver of his right to be present at trial?

3. When a defendant who has been released from custody without bond volun-

tarily absents himself from the jurisdiction of the State and later fails to appear for trial, knowing that the trial would proceed in his absence, is his later unsubstantiated claim of being too impoverished to afford travel expenses sufficient to upset the State Court's finding of voluntary absence and thus voluntary waiver of his right to be present at trial?

4. Petitioner's question four is necessarily included in the proper restatement of the question in 2 above.

STATEMENT OF THE CASE

Petitioner was a twenty-year old, married serviceman (App. p. 27) stationed at Ft. Huachuca, Arizona (App. p. 53) who had been in AWOL difficulties with the Service (App. p. 25-26). On February 24,

1969, he was arrested and charged with unlawful sale of marijuana (App. p. 53). He was arraigned in March, 1969 (App. p. 30), pleaded "not guilty" (App. p. 9), and trial was set for April 22, 1969. On April 21, 1969 (App. p. 28-29), at the request of defense counsel, the trial date was postponed. Petitioner was present in Court at that time (App. p. 28-29, fol. 42). At the time of his arrest, Petitioner was incarcerated and bond was set in the amount of $1,000. Upon the importuning of Petitioner's wife, the County Attorney moved the Court that Petitioner be released in the custody of his commanding officer at Ft. Huachuca, without bond and with his "orders flagged" (App. p. 9). The Court acquiesced and Petitioner was so discharged in

custody. Thereafter, Petitioner was discharged from the Army and, after notifying his attorney of his forwarding address (App. p. 42), he returned to New York City (App. p. 10). Subsequently, the trial court set March 31, 1970, as the date on which the trial was to begin. On March 3, 1970, Petitioner's attorney sent Petitioner a letter advising him that his trial had been set for March 31, requesting Petitioner to reply as soon as possible and to plan on being back in Arizona at least one week prior to trial. He also advised in this letter that the trial probably would not be postponed under any circumstances (App. p. 4). Petitioner received this letter on March 6 or 7 (App. p. 12-13) and understood that the trial would go on without

him if he did not appear (App. p. 27). Petitioner was then twenty-one years of age (App. p. 27). Petitioner made no attempt to contact his attorney until the Saturday before trial, March 28 (App. p. 5, 27, 28), at which time he was unsuccessful in telephoning him. The following Monday morning, March 30, the day before trial, Petitioner did reach his attorney by telephone. Mr. Whitney, the attorney, told Petitioner that the Court would proceed with the trial whether Petitioner was present or not. Petitioner told his attorney he would try to make it to trial but did not have the funds. Petitioner could have asked for financial assistance from his mother in Miami, Florida, but did not do so (App. p. 12). On the day of trial, March 31,

the Trial Judge met with Counsel in Chambers for a hearing as to Petitioner's absence. The Judge pointed out that the County had been put to considerable expense in bringing a witness, along with two federal marshals, from the Federal Reformatory at El Reno, Oklahoma (App. p. 2). At this hearing, the Judge was informed of the letter of March 3 from Petitioner's attorney to Petitioner and the phone call of the previous morning from Petitioner to his attorney. He was also informed that the attorney had sent a second letter to Petitioner, dated March 18, and a telegram, dated March 24. Only after the trial was it determined that the telegram had never been delivered and, at his contempt hearing, Petitioner claimed that he had not

received the letter of March 18 until the evening of April 1. After asking Petitioner's attorney to check with his office and around the Courthouse to see whether Petitioner had arrived (App. p. 5-6), the trial court ordered the matter to proceed to trial in the absence of the defendant (App. p. 6). At about the time trial began, Petitioner's mother, living in Miami, Florida, found out about the matter from Petitioner's mother-in-law (App. p. 14). Sometime during the first day of trial, Petitioner's mother called Petitioner's attorney's office and indicated that she had been unable to contact Petitioner, but that she would continue her attempt to do so and would call back later that night. She never called back. Early the following morning, the second

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day of trial, an attorney in Miami, Florida, called Petitioner's attorney's office and indicated that Petitioner could be present the next morning, April 2 (App. p. 6). Later that same morning the Court met in Chambers with Counsel. Petitioner's attorney reported the telephone calls and moved for a one-day continuance (App. p. 6). The Court denied the motion on the grounds, among others, that there was still no indication from Petitioner that he could be present and that the two phone calls indicating that he might be had originated from Petitioner's mother in Miami, Florida.

Petitioner's father, apparently at the instigation of the mother, had arrived in New York on the evening of April 1. Petitioner and his father flew to Arizona .

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the next day, arriving late in the evening (App. p. 15). On the following morning, April 3, Petitioner went to his attorney's office and, together, they turned Petitioner in to the authorities who arrested him on a bench warrant which had been issued previously.

The question of whether Petitioner's absence from his trial was voluntary was fully litigated on May 4, 1970, when the trial court held a hearing on whether Petitioner should be punished for contempt by reason of his failure to appear for trial. Petitioner was represented at this hearing by his present attorney. Petitioner and his court-appointed attorney testified fully. At the conclusion of this hearing, Petitioner asked to make a statement to the Court and concluded

his statement by saying:

> Of course, the Court has no way of knowing, actually, how I really did feel, but I tell the Court that I had--that I had no intentions of not coming.

The Court replied to this statement as follows:

> I might say this, Mr. Tacon, the Court is impressed not a bit by your expressed intentions in this case. I don't believe any of them, and I just can't see any justification or excuse for your conduct. That's all.
>
> * * * * * *
>
> The record may show the filing in open court of Application for Certificate of Probable Cause, Notice of Appeal, and Application for Admission to Bail. All other matters are taken under advisement. (App. p. 50.)

Petitioner did not file a Motion for

a New Trial. On appeal, however, he raised the issue of whether his absence from trial amounted to a voluntary waiver of his right to be present. The Arizona Supreme Court held as follows:

> The defendant's own testimony clearly shows he was aware that the trial was set for March 31st and that the trial would proceed without him if he failed to appear. The trial court was of the opinion that Tacon's absence was voluntary and there is substantial evidence in the record to support that opinion. Under these circumstances, we hold that Tacon's absence from his trial constituted a knowing and intelligent waiver of his right to be present at the trial and that the trial court, therefore, did not err in proceeding with the trial in his absence. (App. p. 58.)

ARGUMENT

I

CAN A DEFENDANT WHO IS CHARGED WITH A NON-CAPITAL FELONY AND WHO HAS WAIVED HIS RIGHT TO BE PRESENT AT TRIAL BE TRIED IN ABSENTIA CONSTITUTIONALLY?

The real issue under this question is whether Arizona's rule permitting trial in absentia differs constitutionally from the Federal rule. In his beginning, however, Petitioner seems to be making the argument that trial in absentia is always constitutionally infirm. He begins his argument on this question with the statement that Arizona law permits trial in absentia, but that this Court has held that the right of the accused to be present at trial cannot be waived either by himself or by counsel. Incredibly, in

support of this statement, he cites Lewis v. U.S., 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884), and Diaz v. U.S., 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912), while apparently ignoring this Court's statement in Illinois v. Allen (also cited by Petitioner), 397 U.S. 337, 342, 90 S.Ct. 1057, 1060, 25 L. Ed. 2d 353, 358 (1970), that:

> The broad dicta in Hopt v. Utah, supra, and Lewis v. U.S. [citations omitted], that a trial can never continue in a defendant's absence have been expressly rejected. Diaz v. U.S. [citations omitted].

It is apparent from an examination of the cases of this Court that a defendant charged with a non-capital felony can, contrary to the assertion of Petitioner,

be tried in absentia. In Diaz v. U.S., supra, this Court enunciated the rule as follows:

> But, where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present. (223 U.S. 455, 32 S.Ct. 254, 56 L.Ed. 505 [1912].)

The reason for this Rule was well stated in Falk v. U.S., 15 D.C. App. 446 (1899), which was also quoted as supporting the rule in Diaz, supra, and was reaffirmed by Mr. Justice Brennan in his

concurring opinion in Illinois v. Allen, supra,:

> It does not seem to us to be consonant with the dictates of common sense that an accused person....should be at liberty, whenever he pleased, to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. ... ...This would be a travesty of justice which could not be tolerated.....[W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty. (Emphasis supplied by underlining.)

Indeed, the rule is as stated by this Court in Illinois v. Allen, supra,:

> We accept instead the

> statement of Mr. Justice Cardozo who, speaking for the Court in Snyder v. Massachusetts, 291 US 97, 106, 78 L Ed 674, 678, 54 S Ct 330, 90 ALR 575 (1934), said: 'No doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct.'

Thus, the rule that where a defendant who is present at the start of his trial and voluntarily absents himself therefrom may thereafter be tried in absentia has received the judicial sanction of this Court not only by these decisions, but also by the promulgation by this Court of Rule 43, Federal Rules of Criminal Procedure. This construction has also been expressly adopted in the 1st, 2nd, 4th, 6th, and 8th Circuits: U.S. v. Tremont, 438 F.2d 1202 (1st Cir. 1971); U.S. v. Bando, 244 F.2d 833, cert.

denied, 355 U.S. 844, 78 S.Ct. 67, 2 L.Ed. 2d 53 (2nd Cir. 1957); Parker v. U.S., 184 F.2d 488 (4th Cir. 1950); State of Arizona v. Hunt, 408 F.2d 1086, cert. denied, 396 U.S. 845, 90 S.Ct. 81, 24 L.Ed. 2d 95 (6th Cir. 1969); Glouser v. U.S., 296 F. 2d 853, cert. denied, 369 U.S. 825, 82 S. Ct. 840, 7 L.Ed. 2 d 789 (8th Cir. 1961).

The same proposition is adopted in the following state jurisdictions: Arizona - State v. Cumbo, 96 Ariz. 835, 396 P.2d 11 (1964); Arkansas - Nelson v. State, 190 Ark. 1027, 82 SW 2d 519 (1935); California - People v. White, 95 Cal. Rptr. 576, 18 CA 2d 44 (1971); Colorado - Van Houten v. People, 22 Colo 53, 43 P. 137 (1895); Florida - Henry v. State, 94 Fla. 785, 114 So. 523 (1927); Georgia - Miller v. State, 226 Ga. 730, 179 SE.2d

265 (1970); Illinois - People v. Trice, 127 Ill A.2d 310, 262 NE.2d 276 (1970); Kansas - Cox v. Hand, 185 Kans. 780, 347 P.2d 265 (1959), cert. denied, 363 U.S. 822, 80 S.Ct. 1265, 4 L.Ed.2d 1520 (1960); Kentucky - McKinney v. Commonwealth, 474 SW.2d 384 (1971); Louisiana - State v. Benoit, 219 La. 536, 53 So.2d 404 (1951); Massachusetts - Commonwealth v. Flemmi, 71 AS 1909, 277 NE.2d 523 (1971); Michigan - People v. Gant, 363 Mich 407, 109 NW.2d 873 (1961); Minnesota - State ex rel Shetsky v. Utecht, 228 Minn 44, 36 NW.2d 126 (1949); Mississippi - Stokes v. State, 128 So. 2d 341 (1961); Missouri - State v. Drope, 462 SW.2d 677 (1971); New York - People v. Colon, 322 NY Sup. 2d 907 (1971); North Carolina - State v. Turner, 182 SE. 2d 244 (1971); State v. Stockton, 185 SE.

2d 459 (1971); North Dakota - State v. Thompson, 219 NW 218 (1928); Ohio - Wilson v. State, 2 Ohio State 319 (1853); Oklahoma - Cole v. State, 35 OCR 50, 248 P. 347 (1926); Pennsylvania - Commonwealth v. Diehl, 378 Pa. 214, 107 A.2d 543 (1954); South Carolina - State v. Bramlett, 114 SC 389, 103 SE 755 (1920); Texas - Johnston v. State, 477 SW.2d 891 (1972); West Virginia - State v. Blankenship, 137 W.Va. 1, 69 SE2d 398 (1952); Wisconsin - Stoddard v. State, 132 Wisc. 520, 112 NW 453 (1907).

Concededly, most of the above-listed jurisdictions are construing either Rule 43 of the Federal Rules of Criminal Procedure or comparable State rules or statutes, and here we reach the real crux of the argument. Petitioner attempts to

distinguish Rule 231 of the Arizona Rules of Criminal Procedure by noting that FRCP 43 requires that a defendant be present at the commencement of his trial whereas ARCP 231 has no such requirement. He would allow the waiver of presence at trial, but only after trial has commenced. He asserts a constitutional difference between waiver of presence before trial and waiver of presence after trial has commenced.

The Sixth Circuit has had occasion to rule on this point in State of Arizona v. Hunt, supra. It was there stated:

> We find little difference in substance between that Rule [43 FRCP] and the attacked Arizona Rule. .... The District Court found inapplicable Diaz v. United States [citations omitted], and Pearson v. United States, 117 U.S. App.D.C. 52, 325 F.

> 2d 625 (1963). We find them in point upon the principle that voluntary absence from the trial forecloses later claim of constitutional deprivation. (408 F.2d App. 1095, 1096.) (Emphasis supplied by underlining.)

Putting aside the consideration that under such decisions as Coleman v. Alabama, 399 U.S. 1 (1970); U.S. v. Wade, 388 US 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); Gilbert v. California, 388 US 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); and Stovall v. Denno, 388 US 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); it could well be argued that Petitioner's "trial" had already begun, trial in absentia of a felony defendant voluntarily absent throughout all trial proceedings other than arraignment and sentencing does not differ in its constitutional

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import from Federal Criminal Rule 43. The constitutional rights involved are the right of confrontation, the right to assist in one's own defense, and the right of cross-examination. All of these may be waived. The State does not question Petitioner's right to be present at his trial, per Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 8 L.Ed. 674 (1934); nor his right to cross-examination, per Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed. 2d 923 (1965); nor the right of confrontation, per Bruton v. U.S., 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed. 2d 476 (1968). However, voluntarily absenting oneself will have no different effect on these constitutional rights and their exercise whether the absence is after trial commences or after one's

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arraignment, thereby making the practical import of Arizona Rule 231 and Federal Rule 43 the same.

Petitioner comments, in passing, that it is ironic that Arizona would not permit the trial of a physically present but mentally incompetent defendant, but recognizes no restraint in trying a defendant who is physically absent. This comment ignores, of course, the fact that the mental incompetent is mentally not present through no fault of his own, and whether or not Petitioner was absent volitionally and culpably is one of the issues he is attempting to litigate in this Court.

Petitioner also asserts that since the State had the power to seek the extradition of Petitioner, it should have

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elected this remedy rather than the remedy of trial in absentia. We should note parenthetically here that in connection with this power of extradition, Arizona also had the power to see that Petitioner was additionally charged as a fugitive. Still, this claim of Petitioner's is immaterial in this case because it ignores the fact that the State could have refused to allow Petitioner to go from custody without bond. Moreover, an election to exercise one alternative "does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." Snyder v. Massachusetts, supra, 291 U.S. at 105. Finally, Petitioner's claim that extra-

dition must be used would allow ".....a defendant to profit from his own wrong in this way." Illinois v. Allen, supra, 397 U.S. at 345.

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ARGUMENTS

II and IV

DID THE STATE COURT HOLD AN ADEQUATE HEARING AND MAKE A PROPER FINDING ON THE ISSUE OF THE VOLUNTARINESS OF PETITIONER'S WAIVER OF HIS RIGHT TO BE PRESENT AT TRIAL?

At some points in this argument, Petitioner seems to imply that a trial may not be commenced until there is first a hearing to determine if his absence is voluntary, knowing and intelligent. Although conceivably this could be done in the case of a defendant who announced his intentions beforehand, it is a manifest absurdity in the case, as at bar, where the defendant simply never shows up for his trial. Notwithstanding this, the record shows that before beginning trial the trial court did conduct such a

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hearing as was possible under the circumstances. He closely interrogated defendant's counsel as to his communications with the defendant. (At this point in the proceedings, it must be remembered that the trial court had nothing before it to indicate that defendant had not received the letter of March 18 or the telegram of March 24.) The Court had the reports of the telephone conversations between Petitioner and his counsel of March 30, 1970, where Petitioner had told his counsel that he didn't have funds sufficient for transportation, a clear indication that he was not going to be present at trial (App. p. 4-5). The Court further had Petitioner's attorney check with his office and throughout the Courthouse to determine if Petitioner were

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present (App. p. 6). At the conclusion of all this, the Court stated:

> It was reported that Mr. Whitney was unable to locate the defendant and that it is the order of the Court, based on the foregoing matter, that the matter proceed to trial in the absence of the defendant (App. p. 6).

It is thus obvious that the Court conducted as much of and as thorough a hearing as was possible under the circumstances. To require that the Court, at this point, in place of its order that trial commence, should have made an express finding of voluntary absence is to enshrine form over substance. Petitioner states that waiver cannot be presumed from a silent record, under Carnley v. Cochran, 369 U.S. 506 (1962), and other cited cases. Conceded. But the record

is far from silent, and we are not dealing here with a defendant who has appeared and requested permission to absent himself but with a defendant who never appeared.

Petitioner slides by the facts of the first hearing and goes to the second, or contempt, hearing. He has many complaints of this hearing, none of which are valid. First he complains chat the burden of proving that one's absence from trial was not voluntary is "an onerous one indeed." But it was only "onerous" in light of the facts that Petitioner, himself, had created. Petitioner, through his wife, had himself released without bond. Petitioner, on his own, removed himself to a far distant corner of the country. Had he been presenting to the

Court an emergency hospitalization or involuntary incarceration somewhere, we doubt if the burden would have been so difficult. Nor is it improper in this case that the burden of proving the involuntariness of his absence be on Petitioner. What is being litigated here is not a State action, such as the extraction of a confession or the failure to provide an attorney, but the positive action of the Petitioner in absenting himself or absconding. Thus, the burden is properly upon the one who asserts that his action was involuntary.

He also attacks the findings of the Court by stating that as soon as he obtained the funds necessary to finance a trip, he did, in fact, fly to Arizona. He states that this is perhaps the best

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vidence of Petitioner's intention not to
aive his right to be present at trial.
e overlooks, however, the fact that the
rial Judge, by Petitioner's own state-
ents, had evidence that he did not leave
ew York for Arizona until the appearance
rom Spain of his father. The Court also
ad the fact, again from Petitioner's own
tatements, that Petitioner was employed
though perhaps not optimally) and had 24
ays' notice of the date of trial to get
o Arizona, during which time he under-
tood that if he did not appear trial
ould proceed without him. The Court
ould well have concluded from this evi-
ence that Petitioner's intent to return
o Arizona never materialized until his
ather appeared with the parental author-
ty to inspire the trip so that the trouble

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Petitioner was in did not deepen. These comments, however, illustrate the inappropriateness of deciding these issues in the setting of this case as presented to this Court.

Petitioner states that no "procedure for a post trial hearing on such matters is provided for by Arizona law." Such is not the case. Rule 311, Arizona Rules of Criminal Procedure A.R.S. 17, provides as follows:

> RULE 311. GROUNDS FOR NEW TRIAL INVOLVING PREJUDICE OF SUBSTANTIAL RIGHTS OF DEFENDANT
>
> A. The court shall grant a new trial if any of the following grounds is established, provided the substantial rights of the defendant have been thereby prejudiced:
>
> 1. That the defendant was not present at any

> proceeding where his presence is required under these Rules.
>
> . . . . .
>
> B. The court shall also grant a new trial when from any other cause not due to his own fault the defendant has not received a fair and impartial trial.

Moreover, the Arizona Supreme Court in State v. Taylor, 104 Ariz. 264, 266, 451 P.2d 312 (1969), has stated:

> A trial court which commences a trial in the absence of a defendant does so with the knowledge that such absence may later be shown to be involuntary.

The Petitioner did not file a Motion for a New Trial and his failure to do so is unexplained. The rule in Arizona of ancient standing is that where the trial

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court is not given a chance to correct its own error, the Appellate Court will not consider the error on appeal, Sutherland v. Putnam, 3 Ariz. 182, 24 P. 320 (1890); Pickthall v. Steinfeld, 12 Ariz. 230, 100 P. 779 (1909); Taylor v. American National Insurance Co., 1 Ariz. App. 574, 405 P.2d 826 (1965). Notwithstanding this, the issue of whether Petitioner had voluntarily absented himself from trial was presented to the Arizona Supreme Court on appeal. That Court reviewed all of the record, including the extensive record made at the contempt hearing, and concluded that there was more than sufficient evidence to uphold the actions of the trial court. Perhaps the trial court should have made a more explicit finding than its statement that

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it was not a bit impressed by Petitioner's expressed intentions and could see no justification or excuse for his conduct (App. p. 50). But the fact remains that a voluminous hearing covering all of the evidence necessary to the determination of the voluntariness issue was held. If the trial court's conclusion cannot be said to be a finding on this issue, the Arizona Supreme Court's resolution of it, on the merits on appeal, can. It would be inappropriate for this Court, on Certiorari, on this record, to disturb those factual findings.

ARGUMENT

III

WHEN A DEFENDANT WHO HAS BEEN RELEASED FROM CUSTODY WITHOUT BOND VOLUNTARILY ABSENTS HIMSELF FROM THE JURISDICTION OF THE STATE AND LATER FAILS TO APPEAR FOR TRIAL, KNOWING THAT THE TRIAL WOULD PROCEED IN HIS ABSENCE, IS HIS LATER UNSUBSTANTIATED CLAIM OF BEING TOO IMPOVERISHED TO AFFORD TRAVEL EXPENSES SUFFICIENT TO UPSET THE STATE COURT'S FINDING OF VOLUNTARY ABSENCE AND THUS VOLUNTARY WAIVER OF HIS RIGHT TO BE PRESENT AT TRIAL?

Petitioner has asserted in this case the "red herring" of poverty, no doubt in awareness of the diligence of this Court in protecting the rights of the poor of access to meaningful justice. What Petitioner has overlooked, however, is that the holdings of this Court, in

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cases such as Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); and Boddie v. Connecticut, 401 U.S. 371. 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); have all been to the point that no one should be deprived of an essential ingredient of the justice process because he is poor. Thus, counsel at trial or a transcript on appeal, to take two examples, are essential ingredients of the machinery of justice; and, if they are available to the affluent, they must likewise be available, as this Court has so rightly held, to the poor. But transportation to the site of the trial is not now and never has been an ingredient of the justice system, nor has it ever been supplied to the affluent by the

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State. Indeed, Petitioner's complaint here is highly ironic. He asserts a need for travel expenses because the State had beneficently agreed to release him from custody without bond. The State could have acted as it has always:

> .....The first act of the magistrate is to exact security from the defendant, or, in case of refusal, to incarcerate him. ...It is evident that such (a procedure) is hostile to the poor and favorable only to the rich. The poor man has not always a security to pledge. ..... (1 De Tocqueville, DEMOCRACY IN AMERICA, 55-56 [Bradley edition, 1963].)

Instead, in this case, it moved commendably to remove what many think to be an invidious discrimination (see Pelletier v. U.S., 343 F.2d 322, 323 [D. C. Cir. 1965]), by releasing defendant

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without bond. Defendant now seeks to turn this act against the State by claiming that the State either must now furnish him transportation to the site of the trial or be powerless to try him in the orderly processes and progressions of its Court calendars. If such a claim becomes prevailing law, the inevitable result will be to chill, if not kill, the humane modern tendency to release non-affluent defendants on minimal or no bail. This would be doubly unfortunate at a time when the prevailing legal philosophy is to liberalize policies in such areas. (See Sachs, INDIGENT COURT COSTS AND BAIL: Charge Them to Equal Protection, 27 Maryland Law Review 154 [1967].)

The cases Petitioner relies upon, in his poverty claim, deal with persons too

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poor to afford counsel, to afford Appellate review, to afford a divorce, and so forth. They set forth the proposition that one's indigency should not result in a disadvantage within the judicial process. Transportation to trial is clearly an extra-judicial matter and cannot remotely be tied to the process of the orderly and impartial administration of justice.

In the end, Petitioner's claim can be bottomed only on due process or equal protection. It is generally understood that at the basis of due process of law are two elements: notice to the accused and an opportunity to be heard, Boddie v. Connecticut, supra; Kazubowski v. Kazubowski, 45 Ill.2d 405, 259 NE.2d 282 (1970); Wallace v. State, 224 Ga. 255, 161

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SE.2d 288 (1968); Wasson v. Trowbridge, 382 F.2d 807 (CANY, 1967); MacBeth v. Utah, 332 F. Sup. 1191 (D.C. Utah, 1971). There is no showing here, nor can there be, that the State deprived Petitioner of his opportunity to be heard. And, as pointed out before, Petitioner had at least 24 days' notice.

Nor can Petitioner be supported in his claim by equal protection. It is well settled that the essence of equal protection is that all persons similarly situated be treated alike and that what the State extends to one who is affluent may not be withheld from one who is poor, Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed. 2d 39 (1961); Draper v. Washington, 372 U.S. 487 (1963); and Griffin v. Illinois, supra. Transporta-

tion to trial is not something that the State extends to any person, poor or rich.

Indeed, if Petitioner's contention in this setting should prevail, it would logically result in a requirement that the State provide indigent defendants with free transportation to trial, whether they be cross-town, cross-state, or cross-country.

SUMMARY OF THE ARGUMENTS

I

The United States Supreme Court, the United States Courts of Appeals, Federal Rule of Criminal Procedure 43, at least one-half of the States, and Arizona Criminal Rule 231, all hold that a defendant charged with a non-capital felony can be tried in absentia. The trial in absentia of a felony defendant who is voluntarily absent throughout all trial proceedings (other than arraignment and sentencing) does not differ in constitutional import from the situation in which a defendant waives his right to be present after the commencement of trial. The waiver prior to trial of the right to be present at one's trial or the right to confront and cross-examine cannot logically be distin-

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guished from the waiver of these same rights after the trial has begun.

II and IV

There was a proper finding by the Court that Petitioner had voluntarily waived his right to be present at his trial. Before trial a hearing was held to determine whether or not the trial should proceed. The trial court's order that trial proceed as scheduled and its subsequent order denying the Motion for Continuance were the equivalent of a finding of a voluntary waiver by the defendant.

The contempt proceeding after trial, with the defendant present and testifying, was a full evidentiary hearing on the issue of voluntariness. The Court, at the conclusion of this hearing, stated it

was not impressed with Petitioner's "expressed intentions." On review, the Arizona Supreme Court examined the entire hearing as to the merits of the trial court's implicit finding that Petitioner had voluntarily waived his right to be present at trial. With these three separate reviews, each as extensive as was possible at the time it was held (pre-trial, post-trial, and appellate), it is clear that an adequate hearing was held and there was a proper finding of fact as to the voluntary waiver, and that finding should not be disturbed by this Court on Certiorari.

III

Petitioner's unsubstantiated claim of poverty is of no moment in the case at bar. Transportation to trial is a wholly

extra-judicial activity. Petitioner can show no invidious discrimination on the part of Arizona in this regard as Arizona has never provided transportation to or from trial for any criminal defendant, however rich or poor he or she may be. If Petitioner's claim is upheld, it will chill, if not kill, the move toward bail reform.

CONCLUSION

One charged with a felony may waive his presence at trial. There is no constitutional difference between Arizona's rule, which allows a waiver by non-appearance at the commencement of trial, and the Federal rule, which requires that the defendant be present at the commencement before his voluntary absence from trial will be considered a waiver. There were adequate hearings and substantial evidence to support the trial court's conclusion that Petitioner's absence was a voluntary waiver. Petitioner's claim of poverty is irrelevant, since he himself caused the situation by removing himself from Arizona to New York and since transportation to trial is neither a constitutional right nor an ingredient

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of the justice system supplied by the State to anyone. For these reasons, the Courts below should be affirmed.

Respectfully submitted,

GARY K. NELSON
Attorney General
of Arizona

WILLIAM P. DIXON
Assistant Attorney General

Attorneys for Respondent

AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

WILLIAM P. DIXON, being first duly sworn, upon oath, deposes and says:

That he is an Assistant Attorney General of the State of Arizona; that as such he served the attorney for the Petitioner in the foregoing case by forwarding two exact copies of Brief of Respondent on Writ of Certiorari to The Supreme Court of Arizona in a sealed envelope, first class postage prepaid, depositing same in the United States mail, addressed to:

Robert J. Hirsh, Esq.
Messing, Hirsh & Franklin, P.C.
509 Transamerica Building
Tucson, Arizona 85701

this 14th day of August, 1972.

William P. Dixon

SUBSCRIBED AND SWORN to before me this 14th day of August, 1972.

Notary Public

My commission expires:
Mar 5 1973